Automobile Inventories and the Fourth Amendment: *South Dakota v. Opperman.*

Questions regarding the constitutionality of automobile searches made in the course of standard police inventory procedures have long vexed state and lower federal courts. The Supreme Court of the United States had consistently avoided important aspects of this issue in previous fourth amendment cases.[1] In *South Dakota v. Opperman*[2] the Court finally considered the right of the police to inventory a vehicle lawfully in their custody. The result was the upholding of automobile searches in noninvestigatory situations, applying a reasonableness test rather than requiring compliance with the general warrant requirement of the fourth amendment. This Case Comment will analyze *Opperman* in light of previous state and federal court decisions, examine the reasoning and motivations of the various opinions in the case, and discuss the impact of the decision on future litigation challenging police inventory procedures. Unhappily, even after *Opperman* Justice Rehnquist's famous yet doleful dictum on the subject of automobile searches retains its pungency: "[T]his branch of the law is something less than a seamless web."[3]

I. The Facts

During the early morning hours of December 10, 1973, Donald R. Opperman's unattended, locked car was parked on the streets of downtown Vermillion, South Dakota. Local ordinances prohibited such parking between 2 a.m. and 6 a.m. The automobile was ticketed at approximately 3 a.m. The citation warned that "[v]ehicles in violation of any parking ordinance may be towed from the area."[4]

At approximately 10 a.m. a Vermillion metermaid noticed the still overparked vehicle and issued a second citation. The car's presence was also reported to police headquarters pursuant to routine procedure. A police officer went to the overparked vehicle, inspected the tickets, and made arrangements to have the car towed by a private towing service.

The car was towed to the city impound lot, which had been the scene of past incidents of theft from locked vehicles.[5] Noticing several items of personal property inside the automobile, the officer used a tool kept by the tow truck operator to unlock the car. He then secured

1. *See, e.g.*, Cady v. Dombrowski, 413 U.S. 433 (1973); Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967).
2. 96 S. Ct. 3092 (1976).
3. Cady v. Dombrowski, 413 U.S. 433, 440 (1973).
4. 96 S. Ct. at 3095.
5. *Id.* at 3095 n.1.

all items in plain view. The officer had no intention of searching for evidence of crime,[6] but the standard department inventory procedure that he followed called for an examination of the contents of the unlocked glove compartment. There he found a quantity of marijuana.[7]

Although no attempt was made to contact him, Opperman called for his automobile that afternoon. The police retained the marijuana that had been discovered in the glove compartment. Subsequently, Opperman was arrested and charged with possession. His motion to suppress the evidence as the fruit of an illegal search was denied, and he was convicted after a jury trial. Opperman was sentenced to a fine of one hundred dollars and fourteen days in the county jail. The Supreme Court of South Dakota reversed the conviction, holding that the evidence was obtained in violation of the fourth amendment's prohibition of unreasonable searches and seizures.[8]

II. THE COURT'S DECISION

The Supreme Court of the United States reversed the South Dakota Supreme Court. Four justices joined Chief Justice Burger in the majority opinion in which the constitutionality of the inventory was upheld.[9] Justice Powell joined the majority, but also filed a separate concurrence. Justices Brennan and Stewart joined in a dissent written by Justice Marshall; Justice White filed his own dissenting statement. It is interesting to note that one of the five votes in the majority opinion was that of Justice Stevens, who had only recently assumed Justice Douglas' seat on the bench. Since Justice Douglas would certainly have voted with Justice Marshall,[10] the change in personnel determined the outcome in *Opperman.*

Automobile inventory cases present courts with three questions. First, is an automobile inventory a search for purposes of the fourth amendment?[11] Second, if it is a search, is a warrant required? Third,

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6. *Id.*

7. *Id.* at 3095.

8. State v. Opperman, 228 N.W.2d 152 (S.D. 1975), *rev'd sub nom.* South Dakota v. Opperman, 96 S. Ct. 3092 (1976), *reinstated on remand,* 247 N.W.2d 673 (S.D. 1976).

9. Justices Blackmun, Powell, Rehnquist, and Stevens.

10. Justice Douglas' attitude on this subject was very clear. In his *Cooper v. California* dissent he had stated: "These days police often take possession of cars, towing them away when improperly parked. Those cars are 'validly' held by the police. Yet if they can be searched without a warrant, the precincts of the individual are invaded and the barriers to privacy breached." Cooper v. California, 386 U.S. 58, 65 (1967) (Douglas, J., dissenting). Justice Douglas' fears were obviously realized in *Opperman.*

11. The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Automobiles are "effects," and thus are protected by the fourth amendment. Cady v. Dombrowski, 413 U.S. 433, 439 (1973).

if a warrant is not required, how should the fourth amendment standard of reasonableness be applied? Prior to *Opperman* the Supreme Court of the United States had three times decided issues closely related to the inventory questions. *Cooper v. California*,[12] *Harris v. United States*,[13] and *Cady v. Dombrowski*[14] did not, however, provide clear constitutional guidelines for lower courts to apply in dealing with automobile inventory questions. Consequently, in answering these questions the lower courts had weighed the public interest in community protection against the fourth amendment right of privacy in a somewhat discordant manner.[15]

In analyzing the constitutionality of automobile inventories, the Court in *Opperman* could have adopted one of three approaches, corresponding to the three questions outlined above. First, by holding that a noninvestigatory intrusion of an automobile was less than a search for fourth amendment purposes the Court could have declared all automobile inventories constitutionally valid. While some prior case law would have supported such a holding,[16] the Supreme Court itself in *Terry v. Ohio* had warned against attributing "too much significance to an overly technical definition of 'search' "[17] in deciding fourth amendment cases. A resolution of the case on this ground thus seemed unlikely.

A second possible approach would have been to strike down the search for failure to comply with the warrant clause, since no recognized exception to the warrant clause specifically applied to the facts of an automobile inventory.[18] This would have effectively ended automobile inventories as a routine police practice. Some form of administrative warrants might have been required,[19] or all intrusions might have been restricted to the requirements of probable cause searches.[20] Such an extreme approach, however, also seemed unlikely in light of the Court's recent expansion of the so-called automobile exception to the warrant requirement.[21]

A middle course between these extreme positions was chosen

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12. 386 U.S. 58 (1967).

13. 390 U.S. 234 (1968).

14. 413 U.S. 433 (1973).

15. *Compare* Cabbler v. Superintendent, 528 F.2d 1142 (4th Cir. 1975), *cert. denied*, 97 S. Ct. 60 (1976), *with* United States v. Lawson, 487 F.2d 468 (8th Cir. 1973).

16. *See* text accompanying notes 22-32 *infra*.

17. 392 U.S. 1, 17 n.15 (1968).

18. *See* note 41 *infra* and accompanying text.

19. *Cf.* Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative warrant required for building search carried out by building code inspectors).

20. For a case that appeared to adopt this view, see Mozetti v. Superior Court, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

21. *See generally* Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974).

by the Court. The Court decided in effect that the intrusion was a search, but that a warrant was not required. The constitutionality of the inventory in *Opperman* therefore depended upon its reasonableness. This Case Comment will examine how the Court resolved the three questions relating to automobile inventories in light of the treatment they had received prior to *Opperman.*

A. *Is an Inventory a Search?*

1. *The Legal Background*

An intrusion must be a search before fourth amendment protection is invoked. Thus, if a court initially holds that an automobile inventory is not a search for fourth amendment purposes, the questions regarding warrants and reasonableness are never reached, and the inventory is upheld. The leading case applying this approach was *People v. Sullivan.*[22] An automobile had been lawfully taken into police custody because of a parking violation in New York City, and a loaded gun was found in the vehicle during the inventory conducted by the police prior to impoundment. No warrant had been obtained. The New York Court of Appeals held that such an inventory was so far removed from the processes and objectives of criminal law that it did not come within fourth amendment protection against unreasonable searches.[23] In so holding, the court relied upon the definition of "search" found in the Model Code of Pre-Arraignment Procedure, which had defined the word in terms of criminal investigation.[24]

This resolution of the search question was criticized by both courts[25] and commentators.[26] In *Terry v. Ohio*[27] and *Camara v. Municipal Court*[28] the Supreme Court had strongly suggested that the fourth amendment protected all invasions by public officers into personal privacy, not just those based upon suspected criminal activity. It is the individual's reasonable expectation of privacy that is constitutionally guarded.[29] The *Sullivan* rationale did find indirect support, however, in *Wyman v. James.*[30] There the Supreme Court held that the visitation by a social worker into a welfare recipient's home, although mandated by statute, did not constitute a fourth amendment

22. 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

23. *Id.* at 77, 272 N.E.2d at 469, 323 N.Y.S.2d at 952.

24. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE art. 1, § SS 1.01, sub d. [1] (Tent. Draft No. 3, 1970).

25. *See, e.g.*, United States v. Lawson, 487 F.2d 468, 472 (8th Cir. 1973).

26. *See, e.g.*, 40 FORD. L. REV. 679, 686-87 (1972).

27. 392 U.S. 1, 16-19 (1968).

28. 387 U.S. 523, 530 (1967).

29. Katz v. United States, 389 U.S. 347, 351-52 (1967); *see id.* at 361 (Harlan, J., concurring).

30. 400 U.S. 309 (1971).

search since it lacked the "traditional criminal law context"[31] of the fourth amendment. Most lower courts, however, have refused to follow *Sullivan* in holding a narrow definition of the word "search" determinative in the automobile inventory context.[32]

2. *The Opinion in* Opperman

The Court was not compelled in *Opperman* to decide the threshold question of whether the inventory was a search, for the state had abandoned its contention that it was not a search on oral argument.[33] The Court thus assumed without deciding, as it had in *Cady v. Dombrowski*[34] that the intrusion involved *was* a search. The Court avoided the opportunity to be explicit in holding the automobile inventory a search, perhaps to preserve the validity of decisions such as *Wyman v. James*[35] in other areas.[36]

Although it would have been possible to dispose of the case on the grounds that the inventory did *not* constitute a search, the Court's reluctance to do so, while not explained, can also be accounted for. The application of an abstract definition of "search" to decide *Opperman* might well have allowed lower courts in subsequent cases to sanction a constitutionally prohibited result through compliance with a technical definition. The Court pointed out this danger in *Terry v. Ohio* while reviewing the history of "stop and frisk" cases in New York.[37] In *Opperman*, therefore, the Court rejected the approach of *People v. Sullivan*.[38] In assuming without deciding that a search was involved, *Opperman* was not inconsistent with the language of *Camara v. Municpal Court*, in which it had been affirmed that the fourth amendment was drawn to protect all privacy.[39]

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31. *Id.* at 317-18.

32. *See* Miles and Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105, 137-38 (1972). They note that more courts have relied upon the determination that the inventory search is constitutionally reasonable in declaring such searches valid. For other cases holding that an automobile inventory was not a search, see People v. Willis, 46 Mich. App. 436, 208 N.W.2d 204 (1973); State v. Wallen, 185 Neb. 44, 173 N.W.2d 372, *cert. denied*, 399 U.S. 912 (1970).

33. 96 S. Ct. 3092, 3097 n.6 (1976).

34. 413 U.S. 433 (1973).

35. 400 U.S. 309 (1971). *See* text accompanying notes 30-31 *supra.*

36. Justice Powell made clear in his concurrence that he did consider the routine automobile inventory a search, thus explicitly subjecting the inventory to fourth amendment standards. 96 S. Ct. at 3100.

37. 392 U.S. 1, 17 n.15 (1968).

38. 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

39. 387 U.S. 523, 528 (1967).

B. *The Requirement of a Warrant*

1. *The Legal Background*

The Supreme Court decided in *Katz v. United States* that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[40] These exceptions to the warrant requirement, however, have included at least a partial one for automobile searches.[41] The exception originated in 1925 in *Carroll v. United States.*[42] *Carroll* allowed police to stop a moving vehicle and search it without a warrant when probable cause was present. Chief Justice Taft reasoned that "it is not practicable to secure a warrant because the vehicle can be quickly moved . . . ."[43] Based originally upon practicability, the *Carroll* exception has been consistently approved and followed by the Court;[44] it has also been subject to expansion. In the 1970 case of *Chambers v. Maroney*[45] the Court permitted a warrantless search of an automobile by the police at the station house based upon probable cause. The defendant had been arrested elsewhere, so the search could not be justified as incident to arrest.[46] Despite the fact that the automobile was under police control and in no danger of being moved as in *Carroll*, the Court reasoned that a warrant was not necessary, noting that "for the purposes of the Fourth Amendment, there is a constitutional difference between houses and cars."[47] Thus, warrants are generally not required for automobile searches based upon probable cause.[48]

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40. 389 U.S. 347, 357 (1967).

41. Cady v. Dombrowski, 413 U.S. 433, 439 (1973). Other exceptions include hot pursuit, the plain view doctrine, emergency situation, consent, and searches incident to arrest. United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973), *cited in* South Dakota v. Opperman, 96 S. Ct. at 3103 n.10 (Powell, J., concurring). The "stop and frisk" exception of Terry v. Ohio, 392 U.S. 1 (1968), should also be included among the list of exceptions.

42. 267 U.S. 132 (1925).

43. *Id.* at 153.

44. *See, e.g.*, Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 25 (1938); Husty v. United States, 282 U.S. 694 (1931). For other cases citing *Carroll* with approval, see Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968) and Preston v. United States, 376 U.S. 364, 366-67 (1964).

45. 399 U.S. 42 (1970).

46. The search could not be justified as incident to an arrest in light of Preston v. United States, 376 U.S. 364 (1964). In that case defendants were arrested on a vagrancy charge, and their vehicle was searched without a warrant after being towed to a garage. The Court struck down the search. Subsequent cases, however, have severely restricted *Preston*. Today it stands only for the proposition that such a search cannot be justified as incident to an arrest. Cady v. Dombrowski, 413 U.S. 433, 444 (1973). The Court in *Opperman* noted that *Preston* was thus not applicable to an automobile inventory. 96 S. Ct. at 3099.

47. 399 U.S. 42, 52 (1970).

48. Comment, *The Aftermath of Cooper v. California: Warrantless Automobile Searches in Illinois*, 1968 U. ILL. L.F. 401, 409. *But see* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (failure to secure valid warrant before searching automobile on private property violated

In the 1973 case of *Cady v. Dombrowski* the Court extended the so-called "automobile warrant exception" to searches that, "for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[49] In that case the police had searched a vehicle after an accident based upon a reasonable belief that the driver, an off-duty policeman, had been carrying a gun in the car. The search was motivated by a desire "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands"[50] as the result of vandalism at the impound lot. Although the search discovered evidence of a crime, the Court held that in such a noninvestigatory situation, the search was not unreasonable solely because a warrant had not been obtained.[51]

This extension of the automobile warrant exception made sense. The warrant clause was primarily drawn to assure an independent determination of the sufficiency of probable cause. The Court had noted in *United States v. Lefkowitz* that "the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests."[52] In the usual case of a search based upon probable cause, this evaluation by a neutral magistrate serves a useful purpose. But when the police are performing a "community caretaking function" as in *Dombrowski*, there are no facts for a magistrate to evaluate.[53] Thus, the protective purpose of the warrant clause is inapplicable in the noncriminal context.[54] Lower courts have likewise agreed that the warrant clause is generally inapplicable in the case of an automobile inventory.[55]

2. *The Opinion in* Opperman

Consideration of the warrant clause began in *Opperman* with the

fourth amendment despite presence of probable cause) (plurality opinion). The continued vitality of *Coolidge* is in doubt. In *Opperman* the Court quoted extensively from Justice Black's dissent in that case. *See* text accompanying notes 159-60 *infra*. For another case casting doubt on *Coolidge*, see Cardwell v. Lewis, 417 U.S. 583, 593 (1973). By way of contrast, the Court has continued to follow *Chambers* and cite it with approval. Texas v. White, 423 U.S. 67 (1975).

49. 413 U.S. 433, 441 (1973).

50. *Id.* at 443.

51. *Id.* at 448.

52. 285 U.S. 452, 464 (1932).

53. *See* South Dakota v. Opperman, 96 S. Ct. at 3103 (Powell, J., concurring). *Cf.* Comment, *The Automobile Search and Cady v. Dombrowski*, 20 VILL. L. REV. 147, 176 (1974) (warrant requirement geared to probable cause determination). *See also* text accompanying notes 58-59 *infra*.

54. *Cf.* Wyman v. James, 400 U.S. at 317 (visits by social service agency to aid recipients not investigative in the traditional criminal law context).

55. See Miles and Wefing, *supra* note 32, at 139.

Court reviewing its inapplicability in previous automobile cases. The Court pointed out that the fourth amendment has not been as stringently applied to automobiles as to dwellings. There has been a traditional difference for constitutional purposes between homes and automobiles, based upon the diminished expectation of privacy associated with the latter. This is due to the "obviously public nature of automobile travel"[56] and the frequent contact with the police, who must ensure the public safety.[57] This difference has resulted in the more lenient treatment the Court has given automobiles in applying the warrant clause.

This broad reading of the automobile exception, then, pointed the way for the resolution of the warrant issue in *Opperman*. The Court noted that warrants are linked in the text of the Constitution to the concept of probable cause: "The standard of probable cause is peculiarly related to criminal investigations . . . . In view of the noncriminal context of inventory searches, and the inapplicability in such a setting of the requirement of probable cause, courts have held—and quite correctly—that search warrants are not required . . . ."[58] This was a reasonable conclusion. It would indeed have been anomalous to require a warrant when probable cause was not present, since automobile searches have been largely excepted from the requirement when probable cause exists. The Court explicitly stated that both probable cause and warrants were equally "unhelpful" here. "With respect to noninvestigative police inventories of automobiles . . . the policies underlying the warrant requirement . . . are inapplicable."[59] When there is no probable cause analysis for the magistrate to make, there is no need to go before him.

Thus, the Court's rejection of the warrant requirement in *Opperman* rested upon both the benign nature of the intrusion and prior case law regarding automobiles and the fourth amendment. Quasi-administrative automobile searches have been explicitly put beyond the veil of the warrant clause.[60] The Court's discussion further implied, however, that a warrant ought never be required in a situation lacking all motive for investigation of criminal activity. Should the Court in the future transplant the *Opperman* reasoning regarding warrants outside the realm of automobile searches, the warrant clause could be strictly limited in application to criminal investigation. The potential conflict with the holding of *Camara v. Municipal Court*,[61] in which

56. 96 S. Ct. 3092, 3096 (1976).

57. *Id.*

58. *Id.* at 3097 n.5.

59. *Id.*

60. *Cf.* Comment, *The Automobile Inventory Search and Cady v. Dombrowski*, 20 VILL. L. REV. 147, 178 (1974) (reaching this conclusion based upon *Dombrowski*).

61. 387 U.S. 523 (1967).

officials investigating alleged building code violations were required to secure administrative warrants, would be difficult to resolve.

3. *Justice Powell's Concurrence*

Justice Powell, in his concurrence, examined the applicability of the warrant clause to automobile inventories in a similar way. According to Justice Powell, however, there is "no general 'automobile exception' to the warrant requirement."[62] In *Opperman* Justice Powell reiterated his viewpoint, previously expressed in *United States v. United States District Court*, that although the fourth amendment speaks in general terms of reasonableness, reasonableness ordinarily depends upon compliance with the warrant requirement of the fourth amendment.[63]

Nevertheless, Justice Powell admitted that the interests served by requiring interposition by a neutral magistrate were not threatened where, as in *Opperman*, probable cause was not a relevant factor.[64] Further, the warrant clause primarily protects against abuse of police discretion. Powell suggested that where abuse of discretion was not a problem due to the presence of a standard procedure, and where the owner was not present, such an inventory without a warrant was reasonable under the fourth amendment.[65]

The central importance of the warrant clause returns, however, whenever a criminal context is involved. Justice Powell underscored the importance of pristine motives on the part of the police, as had the majority opinion.[66] The warrant clause was thus inapplicable, as far as Justice Powell was concerned, only in the narrow set of cases involving noninvestigatory situations.

C. *The Determination of "Reasonableness"*

1. *The Legal Background*

A concrete standard by which to administer the fourth amendment test of reasonableness apart from the warrant clause has eluded the courts. The Supreme Court has provided only broad guidelines. Justice White in *Camara v. Municipal Court* suggested that in such cases "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which

62. 96 S. Ct. 3092, 3103 (1976) (Powell, J., concurring).

63. 407 U.S. 297, 315 (1972), *cited in* South Dakota v. Opperman, 96 S. Ct. 3092, 3102 (1976) (Powell, J., concurring).

64. 96 S. Ct. at 3103.

65. *Id.* at 3103-04.

66. *Id.* at 3104.

the search entails."[67] The Court has held in this regard that the invasion entailed in an automobile search is less significant than that entailed in the search of a home or office because the public nature of an automobile results in a diminished expectation of privacy.[68] This diminished expectation is also due to an automobile's frequent contact with law enforcement officials and the state's extensive regulation of motor vehicles and traffic.[69] Even so, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away. . . ."[70] A somewhat diminished expectation of privacy does not completely foreclose fourth amendment protection; it simply means that in some cases a search of an automobile might be upheld where a search of a dwelling might not.[71]

Courts have balanced three major justifications for the inventory procedure against the diminished expectation of privacy associated with an automobile. These justifications have included the protection of the police against false claims of theft, the duty of the police to protect valuables left in the automobile during the owner's absence, and the protection of the police against potential danger. Many lower courts have also treated the routine nature of the inventory procedure as a factor favoring reasonableness.

a. *Claims of Theft* The police may be liable for claims of theft if items left in their possession disappear.[72] Such claims may be bona fide or spurious. Some courts have upheld inventories as constitutionally reasonable because the itemizing of valuables left in an impounded vehicle affords protection against false claims.[73] Bona fide claims are avoided by securing the listed valuables. Critics, however, have pointed out that an unscrupulous officer might simply avoid listing an item on the inventory; or an unscrupulous claimant might simply allege that the item was taken by the police during the inventory procedure.[74] In either case little protection against claims of theft is af-

67. 387 U.S. 523, 536-37 (1967). Whether the criteria of reasonableness are to be evaluated strictly in terms of the facts of each case or whether a more general evaluation is permissible is a different problem. *See* text accompanying notes 123-25 *infra*.

68. Cardwell v. Lewis, 417 U.S. 583, 590 (1973). In that case police examined the exterior of an automobile for paint chips after having it towed from the parking lot where the owner had left it prior to his arrest. Despite the presence of probable cause and ample opportunity to secure a search warrant, no warrant had in fact been obtained. In a plurality opinion the court held the search constitutional; the diminished expectation of privacy associated with automobiles excused the lack of a warrant. *See* 36 OHIO ST. L.J. 190 (1975).

69. Cady v. Dombrowski, 413 U.S. 433, 442 (1973).

70. Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971).

71. Cardwell v. Lewis, 417 U.S. 583, 589-90 (1973).

72. *See* Cabbler v. Superintendent, 528 F.2d 1142, 1144 (4th Cir. 1975), *cert. denied*, 97 S. Ct. 60 (1976).

73. *Id.*

74. *See* Comment, *Police Inventories of the Contents of Vehicles and the Exclusionary Rule*, 29 WASH. & LEE L. REV. 197, 204-06 (1972). Justice Powell also noted this possibility in his concurring opinion in *Opperman*. 96 S. Ct. at 3101 (Powell, J., concurring).

forded. While this rationale is therefore of limited utility,[75] courts have continued to employ it.

b. *Protection of Property* Inventories have also been justified by the protection they afford to the owner's property.[76] Although normally not required by statute in the inventory situation specifically, many states generally charge police with the responsibility for protecting private property.[77] This has had some bearing on the determination of reasonableness. In *Harris v. United States*[78] the Supreme Court allowed the admission of evidence that came into plain view while police were rolling up the windows of an impounded vehicle to protect it and its contents from the rain. The Court determined both that the question of a search was not presented since the police were only protecting the automobile and that the "plain view" exception applied.[79] This case at least suggests that the fourth amendment does not prohibit the police from protecting private property in their custody. As the Fourth Circuit stated in *Cabbler v. Superintendent*, "it would be anomalous to find that the Fourth Amendment, designed to insure the sanctity of private possessions, *compelled* the police to leave the personal effects of a prisoner . . . scattered in the street."[80]

At least two states have held, however, that the police owe the owner of a vehicle only a duty of slight care as gratuitous bailees.[81] This is satisfied by merely rolling up the windows and locking the doors. Justifying the intrusion as a service to the owner is even more difficult when his consent is not sought[82] or his protests are ignored.[83] Similar problems arise when the discovery of contraband is not unexpected.[84] The protection of private property is indeed a significant protectible interest;[85] but, unlike fourth amendment rights, property

75. *See* South Dakota v. Opperman, 96 S. Ct. 3092, 3101 (1976) (Powell, J., concurring). *See* Comment, *The Aftermath of Cooper v. California: Warrantless Automobile Searches in Illinois*, 1968 U. ILL. L.F. 401, 408. There the author pointed out the small likelihood of victims bringing tort suits against police.

76. *See* United States v. Mitchell, 458 F.2d 960, 961-62 (9th Cir. 1972).

77. *E.g.*, OHIO REV. CODE ANN. § 737.11 (Page 1976), which requires the police to "protect persons and property" generally.

78. 390 U.S. 234 (1968).

79. *Id.* at 236.

80. 528 F.2d 1142, 1145 (4th Cir. 1975), *cert. denied*, 97 S. Ct. 60 (1976) (emphasis in original).

81. South Dakota and California require only a duty of slight care by the police in an inventory situation. *See* State v. Opperman, 228 N.W.2d 152, 159 (S.D. 1975); Mozetti v. Superior Court, 4 Cal. 3d 699, 708, 484 P.2d 84, 89-90, 94 Cal. Rptr. 412, 417-18 (1971).

82. *See* Boulet v. State, 17 Ariz. App. 64, 495 P.2d 504 (1972), *rev'd sub nom. In re* One 1965 Econoline, 109 Ariz. 433, 511 P.2d 168 (1973).

83. *See* Virgil v. Superior Court, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968).

84. *See* Gonzales v. State, 507 P.2d 1277 (Okla. Crim. App. 1973). *But see* United States v. Kelehar, 470 F.2d 176 (5th Cir. 1972) (inventory upheld although the finding of contraband not unexpected).

85. South Dakota v. Opperman, 96 S. Ct. 3092, 3107 (1976) (Marshall J., dissenting);

can be insured against loss, as several commentators have noted.[86] Some courts have therefore been reluctant to utilize this rationale, particularly when the items to be protected are beyond plain view.[87]

c. *Protection from Danger* The third justification for inventories, protection of the police from danger, has evolved from the Supreme Court's decision in *Cooper v. California*.[88] There the defendant had been arrested for selling heroin, and his car impounded pending forfeiture proceedings. The police searched the car a week after its seizure and found incriminating evidence. This evidence was admitted at trial over the defendant's objection. The Supreme Court upheld the warrantless search and seizure. Justice Black, writing for the Court in a five-to-four decision, stated: "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it,"[89] although no danger was apparent. Reliance was also placed by the Court upon the California forfeiture statute under which the car was held, which gave some possessory interest short of legal title to the police, and also upon the close relationship between the reason for the search and the reason for the arrest.[90] One subsequent Supreme Court decision, however, stressed solely the protection from danger rationale as the basis for the determination of reasonableness.[91] Although occasional lower courts have dismissed the danger rationale as "flimsy" and "remote,"[92] even critics have admitted it cannot be completely dismissed.[93]

d. *Routine Nature of the Procedure* The Court in *Cooper* also stated that "the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment."[94] Nevertheless, in determining reasonableness lower courts have given great weight to the standard nature of automobile inventory practices. In addition to the

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Cabbler v. Commonwealth, 212 Va. 520, 522, 184 S.E.2d 781, 782 (1971), *cert. denied*, 405 U.S. 1073 (1972).

86. *E.g.*, Comment, *Warrantless Searches and Seizures of Automobiles and the Supreme Court From Carroll to Cardwell: Inconsistently Through the Seamless Web*, 53 N.C.L. REV. 722, 761 (1975); Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 853 (1974).

87. *See, e.g.*, State v. Catlette, 221 N.W.2d 25 (S.D. 1974).

88. 386 U.S. 58 (1967).

89. *Id.* at 61-62.

90. *Id.* at 61.

91. Cady v. Dombrowski, 413 U.S. 433, 447 (1973).

92. Boulet v. State, 17 Ariz. App. 64, 69, 495 P.2d 504, 509 (1972), *rev'd sub nom. In re* One 1965 Econoline, 109 Ariz. 433, 511 P.2d 168 (1973). For an equally critical discussion, see State v. Bradshaw, 41 Ohio App. 2d 48, 322 N.E.2d 311 (Wood County 1974).

93. South Dakota v. Opperman, 96 S. Ct. at 3107 (Marshall, J., dissenting); Comment, *Police Inventories of the Contents of Vehicles and the Exclusionary Rule*, 29 WASH. & LEE L. REV. 197, 203-04 (1972).

94. 386 U.S. 58, 61 (1967).

other justifications, many have felt that the routine nature of a search with standardized procedures supports the inference that the inventory is normally not a subterfuge for warrantless exploration.[95]

This logic creates an anomaly, for the citizen is protected from government intrusion only when *suspected* of criminal activity.[96] When suspicion has risen to the level of probable cause[97] the police are, of course, entitled to search. And when *no* suspicion of criminal activity is present, the police are again entitled to search provided they follow the standard department procedure. Only a search based upon suspicion less than probable cause will be prohibited. Many courts, despite the anomaly, have allowed this to constitute almost conclusive evidence of reasonableness.[98]

Of course, the mere claim of a noninvestigatory motive is subject to abuse; therefore, some restraint upon the understandable police motivation to explore for evidence must be provided. The difficulty enters in drawing the line between investigatory and noninvestigatory settings.[99] Judicial optimism has nevertheless prevailed in attempting to distinguish between them.

> We are not unmindful of the possibility that irresponsible or overzealous police officers may attempt to conduct illegal warrantless searches under the guise of protecting impounded cars and their contents . . . . We are unwilling to say that the danger of a pretextual search is so great that we must condemn reasonable steps taken to protect valuable property. . . .[100]

2. *The Opinion in* Opperman

In evaluating the reasonableness of the inventory search in *Opperman*, the Supreme Court relied again upon the concept of the diminished expectation of privacy relating to automobiles found in pre-

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95. *See* Cady v. Dombrowski, 413 U.S. 433, 442-443 (1973) (in which the importance of standard police procedures was stressed); United States v. Mitchell, 458 F.2d 960 (9th Cir. 1972); United States v. Boyd, 436 F.2d 1203 (5th Cir. 1971); Godbee v. State, 224 So. 2d 441 (Fla. Dist. Ct. App. 1969); St. Clair v. State, 1 Md. App. 605, 232 A.2d 565 (Ct. Spec. App. 1967).

96. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

97. For discussions of what constitutes criminal probable cause, see Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Husty v. United States, 282 U.S. 694, 700-01 (1931).

98. *See* note 95 *supra.*

99. Some courts have recognized the difficulty involved in determining actual police motives. *See, e.g.*, Heffley v. State, 83 Nev. 100, 423 P.2d 666 (1967).

100. United States v. Mitchell, 458 F.2d 960, 963-64 (9th Cir. 1972). The controversy in *Mitchell* involved only plain view items; nevertheless, Judge Wright's comments apply to inventory searches in general.

Another way suggested to insure the police were not searching with an ulterior motive would be to hold any criminal evidence found during an inventory inadmissible. *Id.* at 966 (Ely, J., dissenting). But this approach was rejected in *Terry v. Ohio*, 392 U.S. 1, 13-15 (1968).

vious fourth amendment cases. The Court implied that less persuasive justifications might be sufficient to determine the reasonableness of an automobile search involving a "community caretaking function" as in *Opperman*, than would suffice for the search of a dwelling. The justifications relied upon by the Court were those generally advanced by lower courts as favoring the reasonableness of automobile inventories:[101] protection of the owner's property; protection of the police against false claims of theft; and protection of the police from danger. A fourth justification was added to support the search of the glove compartment: the protection of the public from firearms and contraband drugs.[102] In addition to these justifications, the Court also relied upon *Cooper*,[103] *Harris*,[104] and *Dombrowski*[105] in upholding the automobile inventory as a routine police procedure. The Court commented that this result had been reached by the majority of lower courts, which was certainly true,[106] but more important in its analysis was that "[t]he decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable."[107]

Cooper v. California suggested that police have a right to search an impounded automobile for their own protection without a warrant or probable cause. The presence of the state forfeiture statute impressed the Court in *Opperman* as a relatively insignificant factor. "There was, of course, no certainty at the time of the search that forfeiture proceedings would ever be held. . . . No reason would therefore appear to limit *Cooper* to an impoundment pursuant to a forfeiture statute."[108]

Harris v. United States, the second case mentioned by the Court, has been commonly cited as an example of the plain view exception to the warrant requirement.[109] In the Court's reading, however, *Harris* permitted the police to protect an automobile in police custody by means of a noninvestigatory intrusion. This was true even though the issue of the legality of the inventory was expressly reserved in *Harris*.[110] Finally, *Cady v. Dombrowski* was relied upon by the Court

101. *See* text accompanying notes 72-93 *supra*.

102. 96 S. Ct. at 3100 n.10.

103. 386 U.S. 58 (1967).

104. 390 U.S. 234 (1968).

105. 413 U.S. 433 (1973).

106. *See* cases collected in Annot., *Lawfulness of "Inventory Search" of Motor Vehicles Impounded by Police*, 48 A.L.R.3d 537 (1973); Comment, *The Automobile Inventory Search and Cady v. Dombrowski*, 20 VILL L. REV. 147, 181-82 (1974) (excellent collections); South Dakota v. Opperman, 96 S. Ct. 3092, 3097-98 (1976) (less extensive collection).

107. 96 S. Ct. 3092, 3098 (1976).

108. *Id.* at 3098 n.8.

109. *See, e.g., id.* at 3100 n.2 (Powell, J., concurring).

110. 390 U.S. 234, 235 (1968).

for the proposition that where standard department procedures are followed, the search is likely to be reasonable in scope.[111]

This reliance upon *Cooper* and *Harris* was perhaps unjustified. Justice Powell's concurrence quarreled with the Court's refusal to recognize that these cases involved significant factors not found in *Opperman*.[112] In addition, the Court took a large step beyond the rationale of *Dombrowski*, in which the Court had permitted the search of an automobile based upon the actual reasonable belief that the impounded vehicle contained a police officer's loaded firearm.[113] In *Opperman* none of the justifications offered by the Court were actually demonstrated in the record. Apparently no *specific* facts showing the need to inventory the vehicle were required in finding the inventory reasonable. Thus, *Opperman* clearly was intended to approve the automobile inventory as a routine practice, not simply limited to the exigencies of a particular case.[114]

The search of the glove compartment, an area beyond plain view, was explicitly approved by the Court in *Opperman* as reasonable. The defendant had never challenged the inventory of items in plain view; and *Harris* had arguably given the police authority to inventory items left in plain view in a lawfully impounded automobile. Opperman argued, however, that an automobile inventory procedure that allowed police to search an unlocked glove compartment was unreasonable in scope. The Supreme Court disagreed. This was, stated the Court, a reasonable area for a noninvestigatory search to cover.[115] The Court noted that lower courts have recognized that the glove compartment is "a customary place for documents of ownership and registration . . . as well as a place for the temporary storage of valuables."[116] Extending an otherwise valid search to the glove compartment was defended as reasonable upon three grounds. Two of them paralleled the justifications mentioned earlier in the opinion: the protection of the owner's property from thieves or vandals who

111. 96 S. Ct. 3092, 3099 (1976).

112. *Id.* at 3100 n.2 (Powell, J., concurring).

113. *See* text accompanying notes 49-51 *supra.*

114. For a discussion of the Court's similar response in dealing with searches incident to arrest in United States v. Robinson, 414 U.S. 218 (1973), see Lafave, *"Case-by-case Adjudication" versus "Standardized Procedures": the Robinson Dilemma*, 1974 SUP. CT. REV. 127.

115. 96 S. Ct. 3092, 3098 (1976). *See* Comment, *The Aftermath of Cooper v. California: Warrantless Automobile Searches in Illinois*, 1968 U. ILL. L.F. 401, 407:

> If the purpose of the inventory is to record the valuables and other personal property found in the car, it would seem unrealistic to limit the search to a superficial inspection of the vehicle. In view of the fact that a person who does carry valuables in his car will most probably place them in as safe and inconspicuous place as possible, the conscientious investigator will conduct as thorough a search as the circumstances permit.

116. 96 S. Ct. at 3098, citing United States v. Pennington, 441 F.2d 249, 251 (5th Cir.), *cert. denied* 404 U.S. 854 (1971).

"would have had ready and unobstructed access once inside the car,"[117] and the protection of the municipality from claims of lost or stolen property.[118] The third rationale referred to by the Court in connection with the glove compartment was the protection of the public from firearms, as in *Dombrowski*, or contraband drugs, as in *Opperman*.[119]

Two other factors were crucial to the Court's finding. First, the standard nature of the procedure was important, for this insured that the scope of the search would be limited to that appropriate for a noninvestigatory, "community caretaking" function. Following a standard procedure in *Opperman* guaranteed for the Court that the inventory's scope was tailored to achieve the purposes of the underlying justifications. It also lessened the possibility of abuse of police discretion.[120] Second, the Court noted that the motives of the police were proper. The Court stated several times that "there is no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive."[121]

These two requirements were somewhat interrelated, as the Court pointed out. Both must probably be shown for the inventory to be constitutionally valid. The Court hinted that if an investigatory motive were demonstrated, probable cause would be required to justify the search under traditional fourth amendment analysis.[122] Thus, *Opperman* did not give unbridled reign to police in conducting automobile inventories. It held that inventories of vehicles lawfully in police custody were reasonable without a warrant or probable cause when the inventory was conducted pursuant to standard department regulations with no investigatory motive, even if the area searched was beyond plain view.

The Court in *Opperman* intended to establish a general rule, based upon the general cumulative benefits served by an automobile inventory procedure. Neither protection of the police from specific danger nor actual concern over possible false claims of theft was actually relied upon by the police, as the record demonstrated and the dissent reiterated.[123] Furthermore, the Court admitted that protection of the owner's property standing alone would not justify the inventory

117. 96 S. Ct. at 3100 n.10.

118. *Id.*

119. *Id.* This came perilously close, however, to justifying the search by what it disclosed.

120. *Id.* at 3099. Standard procedures were stated to be "a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."

121. *Id.* at 3100.

122. The Court thus implicitly appeared to approve the creation of the very "anomaly" they rejected in *Camara*. *See* note 96 *supra*. The individual's effects receive *more* protection from governmental intrusion when he is suspected of criminal activity. *See* text accompanying notes 172-75 *infra*.

123. 96 S. Ct. at 3106 (Marshall, J., dissenting).

absent some effort to obtain the owner's consent, and no such effort was made in this case. The holding of *Opperman*, however, established a per se rule regarding inventories of vehicles lawfully in police custody justified by the general benefits of the procedure rather than the exigencies of the particular fact pattern.[124] This provides advantages of predictability and easier administration. Application of this per se rule, however, requires the lack of substantial investigatory motive and the presence of a standard practice. These limitations suggest that the method of attack in inventory cases in the future will shift to these requirements. *Opperman* will not close the door to all fourth amendment challenges in this area; it should, however, focus the attention of the courts upon a narrower set of questions in determining the reasonableness of a particular inventory.

The institution of such a per se rule for automobile inventories also suggests that the Court was disenchanted with a case-by-case approach of stricter scrutiny. The costs of that approach imposed by the exclusionary rule's prohibition of introduction of evidence at trial is also a likely reason for the Court's opinion.[125]

3. *Justice Powell's Concurrence*

Justice Powell claimed that prior Supreme Court decisions were not particularly helpful in deciding the reasonableness of the *Opperman* search, contrary to the suggestion of the majority opinion.[126] Powell felt that *Harris v. United States only* illustrated the "plain view exception" to the warrant requirement, that *Cooper v. California* had been based largely upon the police's possessory interest under the California forfeiture statute, and that *Cady v. Dombrowski* had actually turned on the police's reasonable belief concerning the contents of the automobile.[127] The reasonableness of the *Opperman* search could not be determined in light of these cases, but only by a weighing of the governmental and societal interests favoring automobile inventories against the citizen's interest in the privacy of his effects.[128] Justice Powell proceeded to balance the justifications of protecting police from danger, police protection against false claims of theft, and protection of the owner's property against the individual's privacy interest in his automobile.

Justice Powell was more realistic than the majority in dealing with the shortcomings of these justifications. He admitted that the

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124. This was the same approach followed by the Court in United States v. Robinson, 414 U.S. 218 (1973). *See* note 114 *supra.*

125. *See* text accompanying notes 158-66 *infra.*

126. 96 S. Ct. at 3100 n.2.

127. *Id.*

128. *Id.* at 3100-01.

dangers to police from bombs and explosives were remote, but could not be ruled out altogether due to the magnitude of possible harmful consequences. An inability to identify such possibly dangerous automobiles in advance magnified the problem. Although hesitating to rely heavily on this justification, Justice Powell warned against discounting it entirely.

Justice Powell also acknowledged that the police in *Opperman* had exceeded their legal duty of care under state law as gratuitous bailees.[129] Therefore, he noted the protection against false claims of loss or theft rationale was inapplicable in *Opperman*, a fact not mentioned by the majority. Even if the police had been charged with a higher duty of care, Justice Powell questioned the value of inventories in discouraging false claims, "since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from the police records."[130]

The most substantial justification for the inventory procedure in Justice Powell's opinion was the protection of the owner's property. It is, he commented, "a significant interest for both the policeman and the citizen" because of the "substantial gain in security if automobiles are inventoried and valuable items removed for storage."[131] Police custody may last for several days, and the added protection afforded valuables justified the inventory process in Justice Powell's mind.

The privacy interest of the individual needed to be weighed against these benefits. Powell concluded that the limited scope of a standard inventory procedure aimed at protecting property did not constitute an intrusion serious enough to require a finding of unreasonableness when balanced by the practice's benefits. Like the majority, Powell relied heavily upon the fact that the inventory was limited in scope by compliance with standard department regulations. A search would be unreasonable in scope were the police to examine the contents of materials such as letters or checkbooks, which "reveal much about a person's activities, associations, and beliefs."[132] The glove compartment itself, however, was not beyond the scope of such a limited search.[133] Thus, Powell agreed with the majority's finding of reasonableness, weighing the factors involved in a more forthright way.

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129. *Id.* at 3101 n.3.

130. *Id.* at 3101.

131. *Id.*

132. *Id.* at 3102 n.7 (quoting California Bankers Ass'n v. Schultz, 416 U.S. 21, 78 (1974) (Powell, J., concurring)).

133. 96 S. Ct. at 3102. Justice Powell made clear that the glove compartment could always be searched in the course of a standard inventory procedure, and not only when there were items in plain view prompting the search as in *Opperman.*

III. The Dissenting Opinions

A. *Justice Marshall's Dissent*

The four dissenters disputed the Court's determination of reasonableness in *Opperman*. Justice Marshall first concurred with Justice Powell that the inventory in this case involved a search. Quoting the language of *Camara v. Municipal Court*,[134] Justice Marshall readily agreed that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[135] Justice Marshall claimed that he did not need to consider the necessity of a warrant in such a case.[136] He did, however, choose to criticize the Court's analysis of the reasonableness of the inventory search in *Opperman*.

Justice Marshall agreed that in some past cases automobiles had been treated differently than homes, "but even as the Court's discussion makes clear, the reasons for distinction in those cases are not present here."[137] Having dissented in *Cardwell v. Lewis*,[138] *Cady v. Dombrowski*, *Chambers v. Maroney*, and *Cooper v. California*, he was not inclined to allow further relaxation of the fourth amendment as it applied to automobiles.

Justice Marshall first contended that the diminished expectation of privacy associated with automobiles referred to by the Court had never meant that the search of an automobile could be upheld by a less compelling justification than was necessary for the search of a home. The diminished privacy expectation, asserted Justice Marshall, only involves a sacrifice of some privacy interest to the publicity of plain view while travelling; thus, the standards by which a search must be justified are the same for automobiles and dwellings. Plain view items were not involved in the *Opperman* dispute. Therefore, Justice Marshall suggested that the justifications favoring the inventory must be persuasive enough to outweigh the strong fourth amendment interest in the privacy of one's effects.

Justice Marshall protested, however, that the justifications relied upon in *Opperman* were not applicable to the facts in the case. Nothing in the record suggested that the police were using the inventory to determine ownership of the vehicle. In fact no attempt was made to contact the owner. The record also made clear that the protection of the police from danger was not relied upon. There was no indication that "the officer's search in this case was tailored in

134. 387 U.S. 523 (1967).

135. *Id.* at 530.

136. 96 S. Ct. 3092, 3104 and 3108 n.15 (1976).

137. *Id.* at 3105.

138. 417 U.S. 583 (1973). *Cardwell* is discussed briefly in note 68 *supra*.

any way to safety concerns, or that ordinarily it is so circumscribed."[139] Even if relied upon, however, Justice Marshall concluded that this justification would hardly be persuasive.

Furthermore, the Supreme Court of South Dakota had ruled that the police only owed a duty of slight care to the owner under state law. Since this could have been satisfied by securing items in plain view and locking doors,[140] protection against claims of loss or theft could not justify the search. "Moreover, . . . it may well be doubted that an inventory procedure would in any event work significantly to minimize the frustrations of false claims."[141]

Nor did protection of the public from firearms or contraband drugs justify the search according to Justice Marshall. Not only was this not relied upon in prompting the *Opperman* search, but Justice Marshall felt that "[i]f this asserted rationale justifies search of all impounded automobiles, it must logically also justify the search of *all* automobiles, whether impounded or not, located in a similar area, for the argument is not based upon the custodial role of the police."[142] Justice Marshall's argument on this point is weakened, however, if one realizes that *all* automobiles are not as vulnerable to thieves and vandals as are automobiles parked in an unattended impound lot.

Finally, Justice Marshall concluded that the protection of the owner's property, although a significant interest, did not of its own weight justify a routine inventory procedure for impounded automobiles. Since such a search would be for the owner's benefit, it would require either obtaining the consent of the owner, or exceptional circumstances of necessity. Because no attempt had been made in *Opperman* to contact the owner, and no exceptional circumstances had been shown, the search of an area beyond plain view had been, in Justice Marshall's opinion, unreasonable and contrary to fourth amendment standards.

Justice Marshall's strategy in dissent was to divide and conquer the majority's justifications. He pointed out their weaknesses one by one. The majority, however, had made clear that no one justification alone was, or should be, relied upon to uphold the inventory, for the benefits of these justifications, when aggregated, exceeded their apparent value when isolated and examined individually. Their cumulative benefits, particularly when applied to all cases, undergirded the majority's finding of reasonableness. Justice Marshall's failure to address this aspect of the majority's reasoning weakened his criticism of the Court's opinion in *Opperman.*

139. 96 S. Ct. at 3106.

140. State v. Opperman, 228 N.W.2d 152, 159 (S.D. 1975).

141. 96 S. Ct. at 3107.

142. *Id.* at 3107 n.8 (emphasis in original).

Justice Marshall ended by reminding the state court that on remand it was not required to adopt the Court's reasoning, if it felt that the South Dakota constitution provided a basis for a contrary resolution. The states may, of course, adopt stricter standards above the federal constitutional floor established by the United States Supreme Court. In his dissent in *Oregon v. Hass*[143] Justice Marshall had suggested that in overruling state courts on constitutional grounds in criminal cases the Supreme Court should be hesitant to presume that only the federal, and not the state constitution was the basis for the decision. State courts should "be asked rather than told what they intended,"[144] unless clear and decisive in the record, for "[i]t is peculiarly within the competence of the highest court of a state to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum."[145] Justice Brennan, who joined Justice Marshall's dissent, has strongly agreed. In a recent law review article he urged state courts to exercise their power under state constitutions to protect individual liberties.[146]

On remand the South Dakota court did reinstate its previous opinion, basing this decision upon the South Dakota constitution. The court held that an inventory was reasonable only if "it was conducted without investigative motive and its scope was limited to things within plain view."[147]

B. *Justice White's Dissent*

Justice White's dissenting vote is initially surprising when his opinions concerning the fourth amendment, and particularly the warrant clause, are considered.[148] He joined in the Court's opinions in *Cady v. Dombrowski* and *Cardwell v. Lewis*, both of which gave some support to the idea of an automobile exception. In *Almeida-Sanchez v. United States*[149] Justice White outlined his view of the fourth amendment standard:

> As the Court has reaffirmed today in *Cady v. Dombrowski*, . . . the governing standard under the Fourth Amendment is reasonableness, and

143. 420 U.S. 714, 726 (1975) (Marshall, J., dissenting).

144. *Id.* at 727 (quoting Herb v. Pitcairn, 324 U.S. 117, 128 (1945)).

145. *Id.* at 728.

146. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See also* 62 A.B.A.J. 993.

147. State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976).

148. *See, e.g.*, Justice White's broad reading of another exception to the warrant requirement, search incident to arrest during a station house inventory, in United States v. Edwards, 415 U.S. 800 (1974), despite the fact that the justifications for allowing the exception were not present in that case.

149. 413 U.S. 266 (1973).

> in my view, that standard is sufficiently flexible to authorize the search involved in this case.
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> . . . .
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> The Court has been particularly sensitive to the amendment's broad standard of 'reasonableness' where . . . authorizing statutes permitted the challenged searches.[150]

He further pointed out in *Chambers v. Maroney* that "[i]n terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office."[151] One would expect that Justice White's "flexible" view of the fourth amendment, particularly since an automobile was involved and the search was authorized or permitted by a standard department regulation, would have led to his joining the majority. His failure to do so is something of an enigma.

Justice White pointed out that his dissenting vote rested upon his agreement with Justice Marshall's analysis of the specific cause requirement, not Justice Marshall's statements regarding consent.[152] Justice White had said in *Camara v. Municipal Court* that "[t]he basic purpose of this amendment . . . is to safeguard the privacy and security of individuals against *arbitrary* invasions by governmental officials."[153] Even where building inspections were performed by a state regulatory agency, Justice White felt an analog to criminal probable cause was necessary before the search was permissible.[154] His "flexibility" is apparently limited to the area where some type of probable cause is present. Thus, a noninvestigatory search based only upon general policy considerations, such as *Opperman*, did not satisfy, in Justice White's mind, the fourth amendment requirement of reasonableness. A warrant is *never* required for an automobile search, according to White, if probable cause is present.[155] As in *Terry v. Ohio*, Justice White probably would require some "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[156] Such facts

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150. *Id.* at 289-90.

151. 399 U.S. 42, 48 (1970).

152. "I do not subscribe to all of my Brother Marshall's dissenting opinion, particularly some aspects of his discussion concerning the necessity for obtaining the consent of the car owner. . . ." 96 S. Ct. at 3109 (White, J., dissenting). Justice White's dissent must then have been based upon agreement with Justice Marshall's insistence upon a showing of specific facts justifying the search in each case.

153. 387 U.S. 523, 528 (1967) (emphasis added).

154. *Id.* at 538.

155. Justice White's statement in Coolidge v. New Hampshire made this clear: "[S]earches of vehicles on probable cause but without a warrant have been deemed reasonable within the meaning of the Fourth Amendment without requiring proof of exigent circumstances beyond the fact that a movable vehicle is involved." 403 U.S. 443, 524 (1971) (White, J., concurring in part and dissenting in part).

156. 392 U.S. 1, 21 (1968).

were present in *Dombrowski*, *Chambers*, and *Lewis*. They were not present in *Opperman*. "[T]he police in this case had no reason to believe that the glove compartment of the impounded car contained particular property . . . ."[157] It was this failure that led to Justice White's somewhat surprising dissent.

IV. A FURTHER BASIS FOR THE DECISION

In establishing a general rule allowing police inventories of impounded automobiles in *Opperman*, Justice Marshall charged that the Court was elevating "mere possibilities of property interests . . . above the privacy and security interests protected by the Fourth Amendment."[158] This was not, however, in all likelihood the actual motivation for the majority result. The opinion of the Court itself suggested a further reason prompting the result, unmentioned by the Court in explicit terms.

In laying the foundation for its opinion, the Court through Chief Justice Burger quoted Justice Black's dissent in *Coolidge v. New Hampshire*[159] approving reasonableness as the relevant test for fourth amendment purposes. In looking to the late Justice Black as an authority on fourth amendment issues, the Chief Justice could hardly have been unaware of Justice Black's other opinions regarding enforcement of the fourth amendment, as he had expressed them earlier in that same *Coolidge* dissent.

> The Fourth Amendment prohibits unreasonable searches and seizures. The Amendment says nothing about consequences. It certainly nowhere provides for the exclusion of evidence as the remedy for violation. . . . The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. . . .
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> . . . .
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> . . . By invoking this rulemaking power not found in the words but somewhere in the 'spirit' of the Fourth Amendment, the Court has expanded that amendment beyond recognition. And each new step is justified as merely a logical extension of the step before.[160]

It was not a mere coincidence that Black's opinion quoted by the majority also contained this bitter diatribe against the exclusionary rule. Others on the Court have at times expressed their displeasure regarding the rule's functioning.[161] On the same day that *Opperman*

157. 96 S. Ct. at 3109 (Marshall, J., dissenting).

158. *Id.*

159. 403 U.S. 443, 493 (1971) (Black, J., concurring and dissenting).

160. *Id.* at 496, 497, 499 (Black, J., concurring and dissenting).

161. Perhaps the classic statement to date has been Chief Justice Burger's dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). Chief Justice Burger's most recent expression of displeasure with the Courts' utilization of the exclusionary rule is found in his dissent in Brewer v. Williams, 97 S. Ct. 1232, 1248 (1977) (Burger, C.J., dissenting).

was handed down, the Court also decided *Stone v. Powell*,[162] holding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial."[163] In his concurrence in that case Chief Justice Burger made explicit his disinclination to allow the exclusionary rule continued vitality in its present form.

> Its function is simple—the exclusion of truth from the fact-finding process. . . .
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> . . . .
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> . . . It is now used almost exclusively to exclude from evidence articles which are unlawful to be possessed or tools and instruments of crime. Unless it can be rationally thought that the Framers considered it essential to protect the liberties of the people to hold that which it is unlawful to possess, then it becomes clear that our constitutional course has taken a most bizarre tack.[164]

Both Chief Justice Burger and Justice White agreed that the rule should be modified in order to prevent its application to circumstances in which the officer in question had a reasonable, good faith belief in the lawfulness of his conduct.[165] There has been sentiment to eliminate the rule where bad faith is not involved.[166]

In *Opperman* the police were not involved in a bad faith attempt to short circuit the fourth amendment. Investigatory motives, which conceivably might initiate such an attempt, were not present. The police were involved in a benign caretaking function, which as a routine practice had value to the community and to the police. To "exclude from evidence articles which are unlawful to be possessed" in such a situation was viewed by the majority in *Opperman* as "bizarre." But since it was not willing to explicitly limit the exclusionary rule, the Court instead reached its desired result by a liberal construction of the definition of reasonableness, and by a further extension of the warrant exceptions. Justice Black's fear of fourth amendment expansion beyond recognition was met by a watering down of the substantive aspect of the amendment itself, leaving the exclusionary rule intact. The Court's analysis in *Opperman* seemed somewhat insufficient to the dissenters, but antipathy toward the practical results of the exclusionary rule helps to explain the decision.

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162. 96 S. Ct. 3037 (1976).

163. *Id.* at 3052.

164. *Id.* at 3053.

165. *Id.* at 3055, 3072.

166. *See* Michigan v. Tucker, 417 U.S. 433, 446-48 (1974).

V. THE IMPACT OF THE DECISION

The result in *Opperman* was not surprising. "The decisions of this Court point unmistakably to the conclusions reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable."[167] In *Opperman*, however, the Supreme Court for the first time explicitly gave a green light to state and lower federal courts interested in admitting evidence obtained in a non-investigatory intrusion carried out according to standard police department regulations.

Nevertheless, it would be a mistake to read *Opperman* too broadly. The Court made clear that the decision authorized a police inventory only of vehicles lawfully impounded or otherwise in lawful police custody.[168] There must be no pretext concealing an investigatory motive. Standard police procedures were adjudged a necessary factor in the determination of reasonableness. The search of a trunk was not involved in *Opperman*, although the rationale of the case could well extend itself to that situation. The facts should not apply to the constitutionality of opening locked cases or sealed packages. Justice Powell suggested that valuables might only be removed for safekeeping, not examination.[169] Finally, *Opperman* was further removed from the criminal law context than many cases. It was fairly easy in *Opperman* to find the complete absence of investigatory motive. But very few cases involving inventories have arisen because of illegally parked motor vehicles; most litigation has involved inventories following the arrest of the driver.[170] The police will have to satisfy the courts that there was no investigatory motive in such a situation before *Opperman* will allow an inventory to be declared reasonable. Although *Opperman* was clearly not intended to be limited to its facts, an authorization of inventories as a means by which the fourth amendment may be circumvented in all situations was clearly not contemplated, and courts since *Opperman* have not so read the case.[171]

Indeed, it might actually be argued that *Opperman* limited previous case law regarding inventory searches. Many cases had previously allowed inventories whenever an impounded vehicle was involved, even though something approaching criminal probable cause was involved.[172] After *Opperman*, automobile searches should prob-

167. 96 S. Ct. at 3098.

168. *Id.* at 3095. Lawful custody has in the past been seen as crucial in upholding automobile inventories. *See* United States v. Pannell, 256 A.2d 925 (D.C. App. 1969) (lawful custody of vehicle required before protective inventory permitted).

169. 96 S. Ct. at 3102.

170. *See* Annot., *Lawfulness of "Inventory Search" of Motor Vehicle Impounded by Police*, 48 A.L.R.3d 537, 558-66 (1973).

171. *See, e.g.*, Altman v. State, 335 So. 2d 626 (Fla. Dist. Ct. App. 1976).

172. *E.g.*, United States v. Kelehar, 470 F.2d 176 (5th Cir. 1972).

ably be divided into three categories. First, where probable cause is present pre-*Opperman* case law will control, probably allowing the search without a warrant. Second, where no connection whatsoever with the criminal law is demonstrated and the finding of evidence of criminal activity is purely a surprise, *Opperman* will authorize the inventory as reasonable without a warrant under the fourth amendment if standard procedures have been followed.[173] Third, where there is some basis for arguing that the police were searching for evidence of crime, investigation based upon mere suspicion should be foreclosed by the result and its attendant rationale. Critics have argued that such a tripartite division stands the fourth amendment upside down, protecting those who are suspected of criminal activity, but not those who are free from suspicion.[174] Nevertheless, since the Court has expressed its intention to use the exclusionary rule primarily to deter bad faith police conduct,[175] this appears to be the intended result.

VI. CONCLUSION

South Dakota v. Opperman demonstrated the Burger court's interest in softening the impact of the exclusionary rule when the police have acted in good faith. It also enlarged the exceptions to the fourth amendment's warrant requirement. The *Opperman* inventory per se rule allowed factors of general applicability to dictate the result in a particular case. In light of the previous automobile cases of *Dombrowski*, *Lewis*, *Harris*, and *Cooper*, *Opperman* makes clear the direction of the Court in fourth amendment automobile cases. There is still no "seamless web"[176] in this area of fourth amendment law, but it does seem clear that, due to the onerous consequences of enforcing the exclusionary rule, there will continue to be, as Justice White stated, "a constitutional difference between houses and cars."[177]

John W. Cook, III

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173. The police procedures themselves must not be unreasonable in scope. It is reasonable to assume that courts will require the inventory procedures followed to bear some connection with the justifications supporting them. Justice Powell has given clear warning that the standard procedures would allow the search only if they limited the scope of an officer's discretion. *See* text accompanying note 132 *supra*.

174. *See, e.g.*, 7 U. RICH. L. REV. 151, 159 (1972).

175. *See* text accompanying notes 165-66 *supra*.

176. Cady v. Dombrowski, 413 U.S. 433, 440 (1973). *See* text accompanying note 3 *supra*.

177. Chambers v. Maroney, 399 U.S. 42, 52 (1970).